Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1997

WENDY L. KERN,

*Petitioner,*

*vs.*

CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester; ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department; CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TOPP

## QUESTIONS PRESENTED

1. Should the court resolve the conflict among the circuits about Title VII coverage for persons who, though not directly employed, are directly affected and injured by the discriminatory/retaliatory practices of a covered employer?

2. Did the Second Circuit err in deciding that Lt. Cavuoto did not act under color of law in sexually harassing/assaulting Mrs. Kern?

3. Did the Second Circuit overlook the facts and authority supporting Mrs. Kern's 42 U.S.C. 1985(3) and 1986 claims?

4. Should a plaintiff be required to prove that a local union with more than 500 members has 15 or more employees to maintain an employment discrimination/retaliation claim?

5. When the international/parent union with 180,000 members intervenes in local union matters on issues relating to a pending claim of discrimination/retaliation against the local, is it, as well as the local, accountable for the discrimination/ retaliation?

6. Should this Court clarify the rights of individuals to bring sexual harassment claims under Title VII and §§1983, 1985(3) and 1986 because of the exceptional importance of the questions?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

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WENDY L. KERN,

Petitioner

v

CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester; ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; DANIEL CAVUOTO Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department; CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Respondents.

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**PETITION FOR WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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Petitioner Wendy L. Kern (Mrs. Kern) respectfully prays

that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on August 15, 1996.

## OPINIONS BELOW

The Second Circuit opinion is reported at 93 F.3d 38 (2nd Cir. 1996); it is reprinted in Appendix A attached hereto at 1a, infra.

The Second Circuit denied Mrs. Kern's Petition for Rehearing and Suggestion for Rehearing in Banc by order filed October 15, 1996. The decision is reproduced in Appendix B at 1b, infra.

## JURISDICTION

Federal jurisdiction in the trial court was invoked under the Constitution of the United States, the First and Fourteenth Amendments, 42 U.S.C. §§1983, 1985(3) and 1986, Title VII of the Civil Rights Act, 42 U.S.C. §2000(e)5(f), et seq., 28 U.S.C. §§1331, 1343, 2201, and 2202.

The decision of the Court of Appeals sought to be reviewed was issued on August 15, 1996. A timely petition for rehearing was filed on September 11, 1996. The petition for rehearing was denied by order of the Court of Appeals on October 15, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## PERTINENT STATUES

Mrs. Kern's claims in this petition arise under the Constitution of the United States, the First and Fourteenth Amendments, 42 U.S.C. §§1983, 1985(3) and 1986, and Title VII of the Civil Rights Act, 42 U.S.C. §2000(e), et seq. Pertinent excerpts of these laws are attached in Appendix C, at 1c.

## STATEMENT OF THE CASE

Factual Background

Mrs. Kern sues pursuant to the United States Constitution, the First and Fourteenth Amendments, 42 U.S.C. §§1983, 1985(3), 1986, Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, the New York State Civil Rights Law and state common law to recover for sexual harassment, sexual assault, conspiracy to deprive her of her rights, aiding and abetting discrimination/retaliation and retaliation for complaining, assault, battery, breach of contract, intentional infliction of emotional harm, prima facie tort, libel and slander. She claims that from the start of her employment (September 1992) for Respondent Lt. Daniel Cavuoto, a full time City of Rochester managerial employee and then President of the city firefighter's union,[1] Lt. Cavuoto engaged in constant, verbal, sexual harassment of her.[2] She rejected all of his advances.[3]

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1. The union defendants are Local 1071 (1071)of the International Firefighters Association (IAFF) and the IAFF.

2. Mrs. Kern alleges that the verbal harassment included Lt. Cavuoto's discussion of his extramarital sexual exploits and of his acquaintances, the lack of sex with his wife, and his indirect and direct propositions of her for sex.

3. From accounts Mrs. Kern gave her friend, Mary Ann Tomasso, she concluded he was setting Mrs. Kern up for a sexual encounter. Ms. Tomasso likewise believed Mrs. Kern had an alcohol problem; Mrs. Kern could not refuse alcohol. Ms. Tomasso was so concerned for Mrs Kern's safety that she advised Mrs. Kern not to go to lunch with Lt. Cavuoto any more, not to place herself in a position where alcohol would be consumed. Ms. Tomasso was so concerned about Mrs. Kern's safety that she started calling during the work day to inquire about her.

However, on December 30, 1992, while at work at the firefighter union office, Mrs. Kern alleges that Lt. Cavuoto, knowing she has an alcohol problem,[4] with the informed assistance of Respondent Eldridge[5], plied her with alcohol until she was drunk and unable to defend herself. Lt. Cavuoto sexually assaulted her while she was incapacitated from the alcohol.[6] Mrs. Kern had a swollen lip, and bruises on her lip, left leg and right foot as a result of the assault.

After consulting her doctor, talking with a psychiatrist and counselor[7] and making a report to the Rochester Rape Crisis Center, Mrs. Kern reported the ongoing sexual harassment and sexual assault to full time City of Rochester Fire Lt. John McMenemy and

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On December 30, 1992, the day of Lt. Cavuoto's physical assault on Mrs. Kern, Ms. Tomasso called Mrs. Kern at about 11:30 a.m. just before lunch to get Mrs. Kern's assurance that she had no plans to go to lunch with Lt. Cavuoto. Ms. Tomasso called Mrs. Kern again right after lunch, about 2 p.m., to confirm that Mrs. Kern was okay, that she had not gone to lunch with Lt. Cavuoto.

4. Mrs. Kern claims that she told Lt. Cavuoto in October 1992 that she had a drinking problem. Thereafter, he repeatedly offered her alcohol at work and/or at work related lunches. He chided her about learning "to drink."

5. Mr. Eldridge is a retired City of Rochester Firefighter. He is currently in business with Lt. Cavuoto. At the times in question, Lt. Cavuoto and Mr. Eldridge operated their fire safety business in an office adjacent to the union office where Mrs. Kern worked.

6. Mrs. Kern claims that Lt. Cavuoto opened the door when she was using the restroom in the union office before leaving to pick up her children. He backed her against the wall as she resisted his advnces. She passed out, awaking on the floor of the union office, disrobed from the waist down and with Lt. Cavuoto getting off her, disrobed from the waist down.

7. The therapist contacted the Rochester Police Victims Assistance office on January 5, 1993 on behalf of Mrs. Kern.

union treasurer on January 19, 1993. She signed a complaint for Lt. McMenemy with the understanding that he would investigate[8] and follow up on it.[9] At all times relevant, the unions' constitution and by-laws provided for processing of misconduct complaints against union members and/or officers.[10]

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8. Lt. McMenemy's investigation included his talking with Ms. Tomasso about the assault and both the New York State Division of Human Rights and the EEOC about sexual harassment complaints and the obligation to investigate them. He obtained a copy of the City of Rochester/Fire Department Policy 251, Preventing Sexual Harassment. The policy, in pertinent part provides that the City is absolutely liable for acts of sexual harassment by its managerial personnel; responsibility extends to sexual harassment of others of co-workers and non-employees where the City/Fire Department knew or should have known of the conduct but did not act.

9. Lt. McMenemy also signed Mrs. Kern's complaint stating, "1. I take her complaint seriously, and it is my belief that the Executive Board of Local 1071 will be equally concerned. 2. I have made no judgment of fact for or against Wendy or Cavuoto. Each will be treated fairly in this matter. 3. As an officer of Local 1071 who has been informed of her complaint, I will fulfill my obligation to investigate it. 4. I expect her co-operation in this matter, and I will consult with her before taking any action 5. I will report fully to her on what I discover her rights and our obligations to be."

10. Misconduct is defined in the International constitution and by-laws as including:

"A. Refusal or failure without justifiable cause to comply with or abide by the provisions of this Constitution and By-Laws, the valid decision of any officer or officers thereof or the valid decisions of the Executive Board or those of the Association convention, or the valid provisions of applicable constitution and by-laws of local unions, state or provincial associations or joint councils.

* * * *

I. Committing any physical assault upon any officer, member, representative or employee of the Association or of any subordinate body thereof while such person is engaged in the performance of his duties for the International or subordinate unions.

* * * *

On February 24, 1993, Mrs. Kern and her attorney met with City of Rochester Police (RPD) and Victim's Assistance personnel to file a criminal complaint against Lt. Cavuoto. Mrs. Kern co-operated fully with City police personnel in making her complaint, noting that the matter was sensitive since the accused was a Lt. in the Fire Department (RFD) and the RFD employee union president. It was understood that the complaint would be kept confidential until City Police Detectives[11] had the opportunity to confront Lt. Cavuoto.

Nevertheless, police personnel permitted the "leaking" of the complaint information to a retired firefighter and the public. Lt. McMenemy, fearing for Mrs. Kern's safety at work after Lt. Cavuoto learned of her charges, told her not to report to work at the union

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J. Engaging in conduct detrimental to the best interests of the Association or its subordinate unions which places or tends to place them in disrepute with other labor organizations, employers, or the public.

* * * *

L. Conduct unbecoming a member of this Association, provided, however, that utilization of this provision shall be valid only when the charges are set forth in specific terms specifying the act or acts or conduct alleged to be unbecoming a member." International Association of Fire Fighters, AFL-CIO-CLC, Constitution and By-Laws as Amended August 1992, pages 91-93.

The International constitution provides in Article XVI that the accused member or officer is to be notified of the charges. A hearing on the charges by an impartial hearing board is mandated within 120 days of the charges. See Article XVII. The constitution of the International union charges the International General President with insuring strict observance of the International Constitution. See International Constitution pages 34 and 35.

11. Mrs. Kern has evidence that city police personnel who were assigned to take her complaint against Lt. Cavuoto were/are his friends. She was unaware of this relationship until after Lt. Cavuoto had been "tipped off" about her criminal charge.

office.

As a result of the Local union's failure to agree to working conditions to insure Mrs. Kern's safety thereafter, February 25, 1993, was the last day she was at work.

On February 26, 1993, Lt. McMenemy informed City Deputy Chief Griffin about Mrs. Kern's complaints and his investigation. He likewise informed Fire Chief Ippolito.

Mrs. Kern alleges that Fire Chief Ippolito is a friend, ally and supporter of Lt. Cavuoto. She has corroborated these allegations with the affidavit of Lt. McMenemy. After the complaint in this case was filed, Chief Ippolito was suspended by the City for using "bad judgment" as Fire Chief. This bad judgment included his placing a Fire Fighter Officer friend of his against whom there were substantiated charges of sexual harassment of a subordinate in charge of sexual harassment instruction for the RFD. An involuntary retirement for Chief Ippolito followed the suspension.

Lt. McMenemy attempted to keep his promise to Mrs. Kern and process her complaint under the Local 1071 and IAFF by laws and constitution. He was blocked by Lt. Cavuoto and his allies from doing so at the March 2, 1993 union meeting.. Thereafter, the IAFF, although fully informed of Mrs. Kern's claims and her request for Lt. Cavuoto to be charged and tried under the 1071 and IAFF by laws and constitution, assisted Lt. Cavuoto in his moves to keep his allies in the 1071 board positions and the presidency and worked against Lt. McMenemy who supported the by laws and constitution

process.[12]

On March 16, 1993, Fire Chief Ippolito told Lt. McMenemy that he was "...in big trouble" because of taking Mrs. Kern's complaint. He told Lt. McMenemy that his city career was in jeopardy and his union position would be lost if, "...the members [of the union] find out what you did." Immediately thereafter, Chief Ippolito denied Lt. McMenemy a promotion to City Fire Captain that Chief Ippolito had promised him in December 1992. Mrs. Kern claims that this action is retaliation against her. Additionally, Lt. McMenemy promptly filed discrimination/retaliation complaints against the City and union.

Mrs. Kern claims that the City of Rochester through its fire and police personnel knew or should have known of Lt. Cavuoto's making uninvited and unwanted sexual advances to her and to other women. Mrs. Kern corroborated her allegations with an affidavit of city employee and union treasurer, Lt. John McMenemy, who states that Lt. Cavuoto's reputation for womanizing was/is well known. Lt. Cavuoto has openly stated in city fire halls to other city employees that he selected Mrs. Kern for sexual gratification. "I hire my secretaries with fast hands and slow lips." Mrs. Kern also submitted affidavits of two other women, one who states Lt.

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12. In violation of the IAFF Constitution and by laws, General President Whitehead canceled the Local 1071 election in March 1994 at the request of Lt. Cavuoto and without notice to Lt. McMenemy and the candidate he was supporting. Thereafter, Mr. Whitehead caused Local 1071's financial records to be taken from Lt. McMenemy during the subsequent election to disadvantage Lt. McMenemy and the candidates he was supporting. In both elections, Lt. Cavuoto and his candidates campaigned against Lt. McMenemy and his supporters in part because Lt. McMenemy had taken Mrs. Kern's complaint.

Cavuoto sexually assulted her in a RFD parking lot and one who confirms his sexually harassing conversation to women during the work day.

Mrs. Kern claims that the Local union knew or should have known of Lt. Cavuoto's sexual harassment of her and of other women. She corroborated those allegations with the affidavit of Lt. McMenemy confirming that city employees and union members friendly to Lt. Cavuoto serving on the union executive board supported Lt. Cavuoto with knowledge of his preying on women for sex.

Mrs. Kern claims that the IAFF was informed of her complaints about Lt. Cavuoto's sexual harassment/sexual assault on her and although it had/has a duty to act, has failed to act. She corroborated these allegations with copies of the IAFF and local constitution and by-laws which provide that the IAFF must hold the local strictly accountable for following the IAFF constitution and by-laws. As noted above, she offered proof that the IAFF has a by-laws procedure to bring charges against any union officer who assaults or abuses an employee in any fashion; she, with the assistance of city employee and union treasurer, Lt. McMenemy, attempted to use this process to charge Lt. Cavuoto; the IAFF has supported Lt. Cavuoto knowing of Mrs. Kern's charges and of the retaliation Lt. Cavuoto has taken against Mrs. Kern and Lt. McMenemy.

Mrs. Kern claims that her complaints to the local union have resulted in retaliation against her. First the local union refused to provide a safe work environment after the assault; then Lt.

Cavuoto caused her termination.

Mrs. Kern claims that the City of Rochester failed to take any action on her complaints against Lt. Cavuoto. Rather city police personnel[13] placed her life/personal safety at risk when they prematurely leaked information to a retired firefighter and the public that she had made a criminal complaint against Lt. Cavuoto. She alleges that the City has retaliated against, is retaliating against her and Lt. McMenemy by denying him a promised promotion to captain after he assisted her by taking her complaint to the RFD.

Mrs. Kern has corroborated her allegations of city responsibility for Lt. Cavuoto's acts with proof that the city, as a matter of policy and practice, exercises control over the lives and conduct of city firefighters on and off the job. Thus the city has warned and threatened further discipline for off duty firefighters who became involved in a bar fight. The city is pursuing discipline against an off duty firefighter who argued with suburban firefighters about the way to handle a spill in a mall parking lot. The city has unsuccessfully sought in contract negotiations with Local 1071 to get indemnification from the union for the off duty conduct of fire fighters. The city policy on sexual harassment states the city is responsible for Lt. Cavuoto's conduct toward Mrs. Kern. Yet the city has done nothing about his outrageous conduct toward Mrs.

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13. City police failed to include in their reports of Mrs. Kern's complaints or their interview with her witness, Ms. Tomasso, the information furnished about Mrs. Kern's injuries from the sexual assault. Although the police were provided all of Lt. McMenemy's detailed investigation of the claims, none of this information was attached to the complaint papers. The police failed to attach a copy of Mrs. Kern's written statement of complaint to the "incident" report finally prepared. The police never processed an arrest warrant for Lt. Cavuoto.

Kern.

Procedural Background

The Second Circuit affirmed the district court's dismissal of all claims without any discovery holding that Mrs. Kern failed to show Lt. Cavuoto acted "under color of law," that she had failed to show the city engaged a custom or policy of discrimination as required by Section 1983, that she only alleged 1983 retaliation claims against Lt. McMenemy, that because the city was not Mrs. Kern's direct employer, there is no Title VII liability, that Mrs. Kern must show Local 1071 had at least 15 employees to be covered by Title VII and that Local 1071 has fewer than 15 when the union's non-officer board members are excluded. The Second Circuit did not discuss the Section 1985(3), 1986 claims or claims against the IAFF in concluding that other points raised on appeal were "without merit."

## REASONS FOR GRANTING THE WRIT

### POINT I - AN EMPLOYER COVERED BY TITLE VII IS LIABLE FOR DISCRIMINATION (SEXUAL HARASSMENT) AGAINST AN INDIVIDUAL (MRS. KERN) EVEN IF SHE IS AN EMPLOYEE OF ANOTHER EMPLOYER.

#### A. The court should resolve the conflict among the circuits on this elemental Title VII question.

When the Second Circuit dismissed Mrs. Kern's Title VII claims against the City, it placed itself in conflict with all other circuits which have uniformly held that the Congress meant what it said in Section 703(a) that any covered employer is liable for violations of Title VII to "any individual", even employees of another employer. See Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n. of New England, Inc., 37 F.3d

12, 17 (1st Cir. 1994 )[14] - sole company shareholder, president, chief executive and employee has disability claim against company insurance carrier which limited and denied benefits after he had AIDS; Christopher v. Stouder Memorial Hosp., 936 F.2d 870, 875-76 (6th Cir. 1991), cert. denied, 112 S.Ct. 658 (1991) - hospital which denied a non-employee's work as a scrub nurse liable; Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291, 294 (11th Cir. 1988) - hospital alleged to have discriminated against an employee of another hospital is liable; Pardazi v. Cullman Medical Center, 838 F.2d 1155, 1155-56 (11th Cir. 1988) - hospital which denied a non-employee doctor staff privileges is liable for interference with employment with another corporation because staff privileges were required for the latter employment; Doe on Behalf of Doe v. St. Joseph's Hospital, 788 F.2d 411, 422 (7th Cir. 1986) - hospital which denies staff privileges to non-employee doctor liable for possible interference in the employment relationship between the doctor and his patients; Gomez v. Alexian Bros. Hospital of San Jose, 698 F.2d 1019, 1021-22 (9th Cir. 1983) - hospital may be liable for interference with non-employee doctor's employment relationship with his company by denying contract to operate emergency room; Sibley Memorial Hosp. v. Wilson, 488 F. 2d 1338, 1341 (D.C. Cir. 1973) - hospital was liable for refusing to refer female patients to non-employee male private nurse; Puntolillo v. New Hampshire Racing Commission, 375 F. Supp. 1089, 1092 (D. N. H. 1974) - relying on Sibley to hold that since the racing commission and racetrack operator control assignment of stalls to non-employee horse owners, the commission and operator are liable under Title VII.

A claim such as Mrs. Kern makes that the City, through its top managerial employee, Lt. Cavuoto, sexual harassed her on

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14 While the First Circuit in Carparts was interpreting provisions of the ADA, the holding is directly applicable to this case since the ADA and Title VII employer definition provisions are identical. Compare 42 U.S.C. § 2000e(b) (Title VII) with 42 U.S.C. §12111(5)(A) (ADA). See also 29 C.F.R. Part 1630, App. (Interpretive Guidance on § 1630.2(a) - (f) (the term "employer" is "to be given the same meaning under the ADA that [it is ] given under title VII").

the premises of another employer "...fits squarely within the language of Title VII, making it unlawful 'to discriminate against any individual....'" Pardazi, supra at 1156 (quoting 42 U.S.C. §2000e-2(a)(1)). "To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone use of the very criteria for employment that Congress has prohibited." Sibley, 488 F.2d at 1341 (Emphasis added.)

Just as the City would be liable to Mrs. Kern if Lt. Cavuoto had sexually harassed her as a city employee, the city is also liable for Lt. Cavuoto sexually harassing her as a Local 1071 employee. The City is a covered employer whose managerial employee has sexually harassed/assaulted an individual, Mrs. Kern.

**B. The control the City exercised over Mrs. Kern's employment was such as to make her a City employee.**

The City permitted its top management employee, Lt. Cavuoto which it paid full salary and benefits, to work off site full time in the Local 1071 office and other locations that he chose. Mrs. Kern alleges that the City knew or should have known that Lt. Cavuoto was/is a womanizer and had sexually harassed other women. Contrary to the Second Circuit characterization, Mrs. Kern has a corroborated record that the City knew or should have known of Lt. Cavuoto's unlawful conduct. In his affidavit, Lt. McMenemy stated Lt. Cavuoto was known to be a "pig" and to have stated in City fire halls that he hires his secretaries "with fast hands and slow lips."

Thus, because of the City's inaction and/or failure to control or discipline Lt. Cavuoto, its top managerial employee, Mrs. Kern had a supervisor who constantly preyed on her for sex and thereafter assaulted her. Even after the City knew Lt. Cavuoto was alleged to have sexually assaulted Mrs. Kern, the City refused and continued to refuse to take any action - even to

investigate her claims.[15]

On the contrary, the City through its police personnel tipped off Lt. Cavuoto to Mrs. Kern's attempt to bring criminal charges against him, insuring that he could not be confronted by detectives with her charges, endangered Mrs. Kern's personal safety by prematurely "leaking" her contact with the RPD to the public, failed to complete full reports on the evidence Mrs. Kern and other persons provided to them, never processed any criminal charge for the sexual assault nor arrested Lt. Cavuoto. Moreover, when Lt. McMenemy acted on her behalf to bring Mrs. Kern's complaints to the attention of Fire Chief Ippolito, he immediately retaliated against Mrs. Kern and Lt. McMenemy by denying him a promised promotion to Fire Captain.

Full time City employee Cavuoto hired and eventually fired Mrs. Kern after she complained of his sexual harassment and sexual assault. City employee Cavuoto controlled the terms and conditions of Mrs. Kern's employment.

The Second Circuit correctly held in Spirt v. Teachers Insurance and Annuity Ass'n, 691 F.2d 1054, 1063 (2nd Cir. 1982), vacated on other grounds and remanded, 463 U.S. 1223 (1983), reinstated in relevant part on remand, 735 F.2d 23, 25 (2nd Cir. 1984) that the Title VII definition of employer "...is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer'..." Other courts have adopted this same reasoning.

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15 The City has an affirmative obligation to investigate and take appropriate action on sexual harassment complaints. Intlekofer v. Turnage, 973 F.2d 773, 780 n. 9 (9th Cir. 1992) - employer liable because the response was not likely to end the harassment; Paroline v. Unisys, Corp., 879 F.2d 100, 106 (4th Cir. 1989) - the adequacy of an employer's response to sexual harassment is a question of fact - plaintiff's evidence cast doubt on the effectiveness of the employer's response to sexual harassment; Brown v. City of Guthrie, 30 EPD Para. 33,031, p. 26,984 (D.C. Okla. 1980) - "...failure to investigate...[plaintiff's] complaints of sexual harassment and to deal appropriately ...makes it liable for the discrimination of its supervisor."; Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977) - "...an employer may be liable for the discriminatory acts of its agents or supervisory personnel if it fails to investigate complaints of such discrimination."

See Probe v. State Teachers' Retirement System, 27 F.E.P. Cases 1306, 1310 (C.D. Cal. 1981), aff'd , 780 F.2d 776 (9th Cir. 1986), cert. denied, 476 U.S. 1170 (1986); Barone v. Hackett, 602 F. Supp. 481 (D.R.I. 1984); contra, Peters v. Wayne State University, 691 F.2d 235, 238 (6th Cir. 1982).

**C. Title VII prohibits retaliation against employees and others closely associated with them, i.e., third parties.**

When Lt. McMenemy took Mrs. Kern's complaint, he told her he would "fulfill" his "obligation to investigate it". Mrs. Kern in turn promised in writing to cooperate with all investigations he pursued.

At Mrs. Kern's request, Lt. McMenemy took her complaint to Fire Chief Ippolito. Instead of investigating the complaint, Chief Ippolito immediately retaliated against Mrs. Kern[16] and Lt. McMenemy by sending the clearest message possible that the city tolerates gross sexual harassment and will punish those who complain - the City denied Lt. McMenemy promotion to Fire Captain.

Title VII prohibits reprisals against victims of discrimination as well as those who assist with their complaints and/or those who are closely related to the victim/complainant. McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) - supervisor has Title VII suit on claim that he suffered retaliation when he failed to stop other employees from filing discrimination

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16 The Second Circuit at 13a infra describes Mrs. Kern's complaint in part as a complaint that the City retaliated against Lt. McMenemy. To the contrary, Mrs. Kern seeks to recover for the City's retaliation against her by the failure to promote Lt. McMenemy. She alleges that "...Lt. McMenemy's promotion was denied to interfere with plaintiff's rights to equal protection of the laws, to due process, to free speech, to complain about defendant Cavuoto's unlawful acts, to punish Lt. McMenemy for taking her complaint and to prevent by intimidation other city employees from assisting and/or cooperating with plaintiff's complaint."

Lt. McMenemy has testified that he took her complaints of sexual harassment/sexual assault to Chief Ippolito at Mrs. Kern's urging. She thought the City was responsible for the wrongful conduct. Mrs. Kern is complaining about injury in fact to herself. Warth v. Seldin, 422 U.S. 490, 499 (1975).

complaints; EEOC v. Ohio Edison Co., 7 F.3d 541, 545 (6th Cir. 1993) - plaintiff has Title VII suit when he claims he suffered retaliation after co-worker complained for him; Wu v Thomas, 863 F.2d 1543, 1547-48 (11th Cir. 1989) - husband has Title VII suit on claim the he suffered retaliation after his wife filed a discrimination claim against university where both were employed.

**POINT II - LT. CAVUOTO ACTED UNDER COLOR OF LAW IN SEXUALLY HARASSING/ASSAULTING MRS. KERN.**

The Second Circuit correctly held in Gierlinger v. New York State Police, 15 F.3d 32, 34 (2nd Cir. 1994) that "Section 1983 liability can be imposed upon individual employers, or responsible supervisors, for failing properly to investigate and address allegations of sexual harassment when through this failure the conduct becomes an accepted custom and practice of the employer." Not only does the City not dispute that its policy 251, Prohibiting Sexual Harassment, makes it absolutely liable for sexual harassment by its managers/supervisors, it does not dispute it has done nothing about Mrs. Kern's sexual harassment/sexual assault complaint.

Rather the City has acted affirmatively to exacerbate the unlawful acts and to affirm and condone the acts. Thus, with full knowledge of Mrs. Kern's complaints, City police neglected to note Mrs. Kern's injuries and other important information on their reports, they permitted the premature "leaking" of her complaint to the public, endangering her personal safety, they placed no criminal charge against Lt. Cavuoto.

Compelling evidence of the City's custom and practice of tolerating and condoning sexual harassment is their counsel's argument to the District Court that Mrs. Kern's claims are simply a "matter between a man and a woman." The City initially moved to dismiss and for summary judgment not only for itself but for Lt. Cavuoto in all capacities. The City briefed and argued on behalf of Lt. Cavuoto in the Second Circuit.

Lt. Cavuoto has a well known reputation for womanizing. He openly stated in City fire halls that he hired Mrs. Kern

because he wants a secretary with "fast hands and slow lips.'

When the City permitted Lt. Cavuoto to work at the Local 1071 office or other locations as he chose while paying him as a full time employee with full benefits, the City clothed him with both real and apparent authority to act on behalf of the City. Both the constant verbal sexual harassment of and the sexual assault on Mrs. Kern occurred during weekday, business hours while Mrs. Kern was at work.

A person's employment by a state or municipality is ordinarily sufficient to establish that the action was taken "under color of state law." It makes no difference whether the state actor is acting beyond the scope of his/her authority at the time. Wrongdoers "who carry a badge of authority of a state and represent it in some capacity" are liable under Section 1983. Monroe v. Pape, 365 U.S. 167, 172 (1961). See also, Flagg Bros. , Inc. v. Brooks, 436 U.S. 149, 157, n. 5 (1978).

The Second Circuit has correctly held that an employer is liable for sexual harassment if its supervisor uses his/her actual or apparent authority to accomplish sexual harassment or if the supervisor was aided by the existence of the agency relationship to carry out the assaults. Tomka v. Seiler, 66 F.3d 1295, 1307 (2nd Cir. 1995) - plaintiff established an issue of fact that an after work gathering of employees in a Rochester bar was company connected.

At 12a infra, the Second Circuit stated that Mrs. Kern "...fails to demonstrate that Cavuoto's harassment and assault occurred as a result of a municipal custom or policy." Not only does Mrs. Kern have Lt. McMenemy's personal observation of Cavuoto's public womanizing, his knowledge of the close association between Cavuoto and Fire Chief Ippolito but she established that Chief Ippolito placed another officer friend against whom there were founded charges of sexual harassment in charge of sexual harassment training for the RFD. Mrs. Kern established that the City engaged in a custom or policy of ignoring sexual harassment claims in the past and continuing. It is uncontroverted that the City in Policy 251 acknowledges that it is liable for sexually harassing acts of its top management. Yet the City, consistent with its custom and policy of ignoring sexual

harassment complaints, has done nothing about Lt. Cavuoto's sexual harassment of her. No charges were ever brought against Lt. Cavuoto although Mrs. Kern made a criminal complaint to the RPD.[17] As noted above, the City detectives did not even make note of Mrs. Kern's injuries in their report nor did they attach the pertinent written statements of Mrs. Kern and Lt. McMenemy to the report.

Mrs. Kern submits that she has met the tests[18] to establish a custom or policy. With the evidence that Chief Ippolito appointed an officer who had engaged in sexual harassment to train RFD members she has proof that "'the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction.'" Gottlieb v. County of Orange, 84 F.3d 511, 518 (2nd Cir. 1996), quoting Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2nd Cir. 1991). With the evidence that the City and/or Chief Ippolito never did anything about Lt. Cavuoto's well known womanizing either before or after Mrs. Kern's complaints, she has shown that the discriminatory practices of the city officials are "persistent and widespread" and constitute a municipal custom or usage. Sorlucco v. New York City Police Dep't., 971 F.2d 864, 870 (2nd Cir. 1992).

Government conduct which shocks the conscience is separately actionable under 1983 as a substantive due process violation. Rochin v. California, 342 U.S. 165, 172 (1952); Spear v. Town of West Hartford, 954 F.2d 63, 68 (2nd Cir. 1992). The conduct of the City shocks the conscience. While Mrs. Kern was stalked for sex by a high level City manager who conspired to get her drunk so he could obtain what she would not consent to if conscious, the City suggests that this is merely a matter between

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17. While the Second Circuit stated at 5a infra, "...the record does not indicate that Cavuoto was charged with any crime," it is uncontroverted that no arrest warrant was ever processed for Lt. Cavuoto.

18. A single act of a governmental decision marker can meet the "policy and custom" requirement. Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986). The City admits that Chief Ippolito is the final policy making authority for the RFD.

a man and a woman, ignores the assignment of Lt. Cavuoto's city police friends to "investigate" her criminal complaints, failed to note essential, important evidence supporting the criminal complaint, never processed an arrest for Lt. Cavuoto, and permitted its Fire Chief to retaliate against Mrs. Kern and Lt. McMenemy when he brought Mrs. Kern's complaint to him.

**POINT III - THE COURT OVERLOOKED THE FACTS AND AUTHORITY SUPPORTING MRS. KERN'S 42 U.S.C. 1985(3) AND 1986 CLAIMS.**

**A. Section 1985(3) claims are stated against the City, Cavuoto, Ippolito, Eldridge and Local 1071.**

In its decision, the Second Circuit did not discuss Mrs. Kern's well pleaded 42 U.S.C. 1985(3) claims which lie against the City, Cavuoto, Ippolito, Eldridge and Local 1071. Mrs. Kern need only show that two or more persons have engaged in a conspiracy to deprive her of her constitutional rights to have a cause of action against "...any one or more of the conspirators." 42 U.S.C. 1985(3). She need not show that the acts were those of a "state actor" or that the person acted "under color of state law." Griffin v. Breckenridge, 403 U.S. 88, 95-103 (1971).

Mrs. Kern alleges the particulars of the conspiracy in great detail. Lt. Cavuoto conspired with Mr. Eldridge to sexually harass/sexually assault her. She supports these allegations with proof that Lt. Cavuoto constantly associated with Mr. Eldridge at work. They frequently drank together. Both of them kept a book in the office on how to please women sexually. They kept a supply of liquor in the adjacent Life Safety offices.

The motive and intent of both Cavuoto and Eldridge is

established by the course of conduct preceding the sexual assault - the constant verbal sexual harassment by Cavuoto of Mrs. Kern, his badgering her to drink although she had told him she had an alcohol problem. Knowing of the ongoing sexual harassment, Ms. Tomasso knew Mrs. Kern was in danger at work before December 30, 1992. She made long distance calls to Mrs. Kern at work to check on her because of her well grounded fears.

Mrs. Kern can establish that Lt. Cavuoto and Mr. Eldridge enticed her to drink with them after she had declined to go to lunch with them on December 30, 1992. Lt. Cavuoto and Mr. Eldridge brought wine to her and when that was consumed, gave her mixed drinks. Mrs. Kern was drunk when she tried to leave to get her children and was forcefully kissed by Lt. Cavuoto and Mr. Eldridge.

After the sexual harassment/sexual assault, Mrs. Kern alleges the defendants conspired to suppress her complaints of sexual harassment/sexual assault. Lt. Cavuoto's friends were assigned to investigate her criminal complaint. They did not include in their report such essential information as the injuries she sustained in the attack nor did they attach to their report either her written statement or the written investigatory information provided to them by Lt. McMenemy. Lt. Cavuoto and Mr. Eldridge were "tipped off" about her complaint before each could be confronted by a police detective.

When Lt. McMenemy informed Chief Ippolito that he had taken Mrs. Kern's complaint against Lt. Cavuoto and was pursuing an investigation of it, Chief Ippolito told Lt. McMenemy

that he was in big trouble with the mayor, had jeopardized his City career and his position in the union (should the City firefighters find out what he had done). Chief Ippolito thereafter retaliated against Mrs. Kern and him by denying Lt. McMenemy his promised promotion to City Fire Captain.

Mrs. Kern has substantial evidence that Chief Ippolito is a close friend, ally and supporter of Lt. Cavuoto. Lt. McMenemy describes the "...direct connection between the running of the City Fire Department and the management of the union because Chief Ippolito was/is a close friend, ally and supporter of Lt. Cavuoto..."

These allegations state a claim of conspiracy under §1985(3). Dwares v. City of New York, 985 F.2d 94, 99, 100 (2nd Cir. 1993)(quoting 2A Moore's Federal Practice ¶8.17[6], p. 8-109, 8-110) - while a plaintiff should not plead "...mere evidence, he should make an effort to provide some 'details of time and place and the alleged effect of the conspiracy.'" The conspiracy pleading rules require a plaintiff to "...inform the opposing party of the nature of the conspiracy charged, with only as much detail as required to enable it to respond intelligently..." Id. Additionally, "...the pleader should be accorded some leeway, since the nature of conspiracy is such that the details may not be available when the pleading is prepared." Id. (Footnote omitted.) See also, Weise v. Syracuse University, 522 F.2d 397, 408 (2nd Cir. 1975) - plaintiff's allegations that discriminatory actions were taken against her by the defendants collectively and in concert with invidious intent is sufficient.

It is important to note that the Second Circuit dismissed these claims without permitting Mrs. Kern to obtain any of the discovery she had requested. Discovery in conspiracy cases is essential "Because conspiracies are carried out in secret, direct proof of agreement is rare." Kraemer v. Grant County, 892 F.2d 686, 689, 690 (7th Cir. 1990).[19] Summary judgment should be entertained only after there has been adequate time to complete discovery. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250, fn.5 (1986). Respondents' conspiracy was a conspiracy to deny Mrs. Kern her right as a woman to equal protection of the laws.[20] Mrs. Kern as a woman shares this right with all women as a class.

In West Hartford v. Operation Rescue, 991 F.2d 1039, 1048 (2nd Cir. 1993), the court held that women are entitled to the protections of §1985(3) under the standards noted by this Court in Bray v. Alexandria Women's Health Clinic, 506 U.S.

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19. After the district court had severed and dismissed Mrs. Kern's state claims and after she had refiled the state claims in state court, Mrs. Kern obtained some admissions from respondents in state court. These include the admissions that Lt. Cavuoto grew up in the same neighborhood as the city detectives who "investigated" Mrs. Kern's claims. Lt. Cavuoto has known these detectives since childhood. Both Lt. Cavuoto and Mr. Eldridge admit that prior to December 30, 1992 (the date Mrs. Kern was assaulted), Mr. Eldridge knew Lt. Cavuoto had a book on how to please women sexually in the Life Safety office. Mr. Eldridge admitted that he had placed the "Hi Danny" note on the cushion on the sofa bed in the Life Safety office. These facts were provided to the district court as a part of Mrs. Kern's motion to supplement the record. The district court found the facts to be "irrelevant" and denied the motion.

20. A state and/or a municipality or responsible supervisors deny a woman equal protection of the laws when they fail to investigate and/or take appropriate action in connection with complaints of sexual harassment. Gierlinger v. New York State Police, 15 F.3d 32, 34 (2nd Cir. 1994)

____ , 113 S. Ct. 753(1993).[21] Courts have expressly held that women are a covered class under §1985(3).

See for example, Volk v. Coler, 845 F.2d 1422, 1435 (7th Cir. 1988)- allegations that company employees conspired to retaliate against a woman for claims of sexual harassment are actionable under 1985(3); Stathos v. Bowden, 728 F.2d 15, 21 (1st Cir. 1984)- 1985(3) jury verdict for two women who claimed company employees conspired to deprive them of pay because of sex affirmed; Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979)- denial to women of equal access to disability insurance is actionable under 1985(3); Skadegaard v. Farrell, 578 F.Supp. 1209, 1219 (D.N.J. 1984)- woman who claims sexual harassment may sue under 1985(3); Hodgin v. Jefferson, 447 F. Supp. 804, 808 (D. Md. 1978) - woman claiming sex discrimination (denial of equal pay and constructive discharge) can sue under 1985(3).

Nor does Mrs. Kern need to allege or prove that the discriminatory treatment was practiced against all women to succeed on her 1985(3) claims. "Under the equal protection clause, however, Volk need not prove that an entire class was discriminated against....To make this showing, it is not necessary to show that all women employees are sexually harassed. Harassment of the plaintiff alone because of her sex is enough."

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21. Four justices of the Supreme Court held that sex is a suspect classification in Frontiero v. Richardson, 411 U.S. 677, 688 (1973). The Supreme Court held in United States v. Virginia, ___U.S. ___ (1996), 1996 U.S. LEXIS 4259, *31 that "official classification based on gender" must be "'exceedingly persuasive'" to be allowed.

Volk v. Coler, supra at 1433, 1434 quoting Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986).[22]

**B. Section 1986 claims are stated against respondent Eldridge.**

Respondent Eldridge filed no brief with the Second Circuit contesting that the court below erred when it dismissed Mrs. Kern's claims that he violated Section 1986 when he failed to prevent Cavuoto's sexual attack on her or to aid her in any way. Respondent Eldridge did not have the benefit of any other respondents arguing in their briefs that the lower court's 1986 ruling is correct.

A person is liable for violation of 42 U.S.C. §1986 when that person had the "power to prevent or aid in preventing the commission of...[a wrong mentioned in section 1985 but who] neglects or refuses to do...[so]." Mrs. Kern has alleged sufficient facts for a jury to conclude that Mr. Eldridge knew exactly what Lt. Cavuoto had in mind by bringing a very large bottle of wine back to the union offices after Mrs. Kern had declined lunch with them. Mrs. Kern can prove that Mr. Eldridge was a long time business associate of Lt. Cavuoto and drank with him frequently. It is uncontroverted that the union and Life Safety offices were adjacent.

Mrs. Kern had before the court a corroborated record supporting these claims. Ms. Tomasso understood what Lt. Cavuoto had in mind for some time. She was so fearful of Mrs. Kern's imminent danger that she called on December 30, 1992,

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22. The Second Circuit cited Bohen with approval in Gierlinger, supra.

before and after lunch from her job hundreds of miles from Rochester to assure herself that Mrs. Kern was safe. Within an hour after Ms. Tomasso's last call, Lt. Cavuoto and Mr. Eldridge came back to the union office with a large jug of wine and proceeded to ply Mrs. Kern with alcohol and render her intoxicated. Ms. Tomasso's worst fears became reality. A jury can conclude that Mr. Eldridge knew of Mrs. Kern's danger and failed to act to prevent her harm.

**POINT IV - LOCAL 1071 AND/OR THE IAFF ARE TITLE VII EMPLOYERS.**

The Second Circuit's dismissal of Title VII claims against Local 1071 and the IAFF is based on its inaccurate findings at 17a, 20a, and 21a infra that a union employee need show the covered union employers have 15 or more employees rather than 15 or more members, that Local 1071 does not have 15 employees and that the IAFF employees cannot be counted with the Local employees.

**A. A covered union employer need have only 15 or more members to be liable under Title VII.**

In finding that Mrs. Kern need show her union employers had 15 or more employees rather than 15 or more members, the Second Circuit followed its new decision, Yerdon v. Henry, 1996 U.S. App. LEXIS 19872 (2nd Cir. 1996) where it rejected 20 years of well established EEOC interpretation and application of Title VII. The EEOC filed an amicus brief in Yerdon in support of its policy and regulation permitting Title VII claims against

unions with 15 or more members[23] regardless of the number of employees.

EEOC interpretations of Title VII are entitled to great weight. Local 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3073 (1986); Albemarle Paper Co. v. Moody, 422 U. S. 405, 431 (1975); Swartz v. Gordon, 761 F.2d 864 (2nd Cir. 1985). As long as the EEOC view is rational, the court will not substitute its judgment for that of the agency. Chemical Manufacturers Ass'n v. National Resource Defense Counsel, 470 U.S. 116, 125 (1985). The plain language of §703(c) prohibits a labor organization from sexually harassing its own employees.

**B. Local 1071 and its parent, the IAFF, each have 15 or more employees.**

Mrs. Kern claims that Local 1071 and its parent, the IAFF, each have 15 or more employees. But the Second Circuit found at 21a infra that eight Local 1071 non-officer board members (trustees) were not "employees" because they did not perform "...any traditional employee duties, such as maintaining records or managing the office" and that these persons were not "...responsible to anyone but themselves."

The office work performed routinely by these trustees was noted in great detail. See, for example, trustee Celento's summary of his work for June 1989 - picking up envelopes, hats and wine, buying supplies for picnic, returning supplies to office,

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23. Local 1071 has about 500 members; the IAFF has about 180, 000.

preparing thank you letters. Or see trustee Hess's September 1992 list for office deliveries. Or see trustee Cichotti's July 1995 summary - work on MDA picnic at office, pick up items for auction, shopping for MDA picnic at Sam's/Tops. From Local 1071 documents, Mrs. Kern prepared a listing of the routine office work done by the board members; she demonstrates that virtually all day-to-day office management and functions were performed by board members. Lt. McMenemy was prepared to testify that Local 1071 business is conducted by himself and other Board members 24 hours a day, seven days a week, 365 days a year, on and off the job, in and outside the union office.

The Second Circuit correctly held in EEOC v. Johnson & Higgins, Inc., 1996 U.S. App. LEXIS 19890 (2nd Cir. 1996) that directors of a corporation are also "employees" where the directors perform traditional employee duties. Just as the directors in EEOC v. Johnson & Higgins, Inc., supra were accountable to "senior members of the board", the trustees are accountable to Local 1071's officers. Consistent with EEOC v. Johnson & Higging, Inc., supra, Local 1071 is properly sued by Mrs. Kern.

**C. Local 1071 is the agent of the IAFF.**

In its decision, the court did not discuss the facts which establish that the IAFF has instigated, supported, ratified, encouraged or otherwise participated in the acts committed by Local 1071 or the individuals in this case. It is the **affirmative** conduct by the IAFF on behalf of Lt. Cavuoto, contravening its own constitution and bylaws, and taken with full knowledge of Mrs. Kern's complaint through Lt. McMenemy and knowledge

that its acts would assist Lt. Cavuoto and his cronies retaining control of Local 1071 that is the decisive evidence making the IAFF liable to Mrs. Kern and dictating the counting of its employees.

The IAFF has pledged to assist victims of sexual harassment as a signatory to the AFL-CIO sexual harassment statement. The IAFF is charged with insuring strict compliance by Local 1071 with the IAFF constitution and bylaws. The IAFF was required to hold Lt. Cavuoto accountable for Mrs. Kern's sexual harassment charges.

Notwithstanding its duty to act on her complaint, the IAFF has used its power affirmatively to support Lt. Cavuoto and keep him in power. It has done so when it has known that Lt. Cavuoto was trying to defeat Lt. McMenemy's re-election to Union office because he had taken Mrs. Kern's complaint. It has done so knowing its actions will assist Lt. Cavuoto and disadvantage Lt. McMenemy.

It is uncontroverted that as a part of the IAFF's "weighing in" on the side of Lt. Cavuoto, it canceled Local 1071's election in 1994, in violation of the IAFF constitution and bylaws. In 1994 and 1995, the IAFF took and kept Local 1071's financial records from Lt. McMenemy, Union Treasurer, knowing that this taking would disadvantage Lt. McMenemy in his union re-election campaign where his taking Mrs. Kern's complaint was an issue.

Because the IAFF is one and the same as Local 1071 or Local 1071 is its agent, IAFF employees, admittedly over 15, are

counted to meet Title VII requirements. See Rodonich v. House Wreckers' Union Local 95, 817 F.2d 967, 974-976 (2nd Cir. 1987) - affirming a jury verdict against an international union "...for having ratified Local 95's action with full knowledge of its unlawful character because the charges of slander were violative of LMDRA on their face," and finding district court jury instructions appropriate - "The International may be held liable with respect to a particular claim if you find that it instigated, supported, ratified, encouraged or otherwise participated in any act committed by Local 95 or the individual defendants." (Emphasis in the original.); NLRB v. Local Union 46, Metallic Lathers & Reinforcing Ironworkers, 727 F.2d 234, 237 (2nd Cir. 1984)- international liable under the National Labor Relations Act for ratifying the imposition of unlawful discipline through its internal appellate process. See also, Phelan v. Local 305, 973 F.2d 1050 (2nd Cir. 1992).

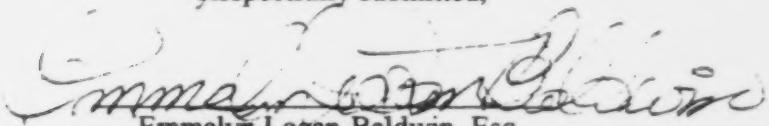
**POINT V - THE ISSUES PRESENTED ARE OF EXCEPTIONAL IMPORTANCE.**

The Supreme Court has described the elimination of workplace discrimination as a "policy 'of the highest priority.'" New York Gaslight Club v. Carey, 447 U.S. 54, 63 (1980). In a series of cases, this Court has held that sexual harassment violates Title VII and other civil rights laws. Recently, the Supreme Court held that a plaintiff need not show psychological harm to recover for a sexually harassing hostile work environment. Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993). The Supreme Court and Congress have amended Federal Rule of Evidence 412 to "...protect alleged victims [of sexual assault/sexual harassment]

against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping..." because of the "...strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim." Moore's Federal Practice 1996 Rules Pamphlet, part 2, page 167.

The Court should grant certiorari in this case to clarify the rights of individuals to bring sexual harassment claims under Title VII and §§1983, 1985(3) and 1986. A result that leaves an individual who has been sexually assaulted by a city manager and union president without a federal cause of action is clearly erroneous.

Respectfully submitted,



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January 10, 1997
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# APPENDIX A

## APPENDIX A

WENDY L. KERN, Plaintiff-Appellant, v. CITY OF ROCHESTER, FIRE DEPARTMENT, of the City of Rochester, POLICE DEPARTMENT, of the City of Rochester, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE, Defendants-Appellees.

Docket No. 95-9107

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

93 F.3d 38; 1996 U.S. App. LEXIS 20636; 71 Fair Empl. Prac. Cas. (BNA) 1391

May 16, 1996, Argued
August 15, 1996, Decided

PRIOR HISTORY: [*1] Appeal from a judgment of the United States District Court for the Western District of New York

(Telesca, C.J.) denying appellant's motions to amend her complaint to add claims under Title VII of the Civil Rights Act of 1964 and dismissing claims asserted by appellant under 42 U.S.C. @ 1983.

DISPOSITION: Affirmed.

COUNSEL: EMMELYN LOGAN-BALDWIN, Rochester, NY, for Plaintiff-Appellant.

CHARLES D. STEINMAN, Rochester, NY (Linda S. Kingsley, Corporation Counsel, Rochester, NY, of counsel), for Defendants-Appellees City of Rochester, Fire Department of the City of Rochester, Police Department of the City of Rochester, and Charles D. Ippolito.

BRADLEY A. SHERMAN, Culley, Marks, Tanenbaum, Capell and Pezzulo, Rochester, NY, for Defendant-Appellee Rochester Firefighters Association, Inc., Local 1071 IAFF.

ERICK J. GENSER, Washington, DC (Thomas A. Woodley, Mulholland & Hickey, Washington, DC, of counsel), for Defendant-Appellee International Association of Firefighters.

JUDGES: Before: MESKILL and MINER, Circuit Judges, and LASKER, District Judge. *

* The Honorable Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation. [*2]

OPINIONBY: MINER

OPINION: MINER, Circuit Judge:

Plaintiff-appellant Wendy L. Kern appeals from a judgment entered in the United States District Court for the Western

District of New York (Telesca, C.J.) denying her motions to amend her complaint and dismissing the complaint for failure to state claims upon which relief can be granted. Kern alleged in the complaint, inter alia, that defendants-appellees City of Rochester (the "City"), the Fire Department of the City of Rochester (the "RFD"), Daniel Cavuoto, and Charles Ippolito (together, the "City Defendants") were liable, pursuant to 42 U.S.C. @ 1983, for unconstitutional employment discrimination. In her first proposed amended complaint, Kern repleaded her @ 1983 claims against the City Defendants and added a cause of action for employment discrimination against the City Defendants and defendant-appellee Rochester Firefighters Association, Inc., Local 1071 IAFF ("Local 1071") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. @@ 2000e et seq. In the first of three Decisions and Orders, the district court found that Kern failed to state a claim under @ 1983, and that it would be futile to allow Kern to amend her complaint [*3] to add a Title VII action because she could not sustain a Title VII action against either the City Defendants or Local 1071. In her second proposed amended complaint, Kern alleged Title VII violations as her sole federal cause of action. In two subsequent Decisions and Orders, the district court again found that it would be futile to allow Kern to add a Title VII action and therefore denied Kern's motion to amend her complaint. On October 5, 1995, judgment was entered dismissing Kern's complaint.

For the reasons that follow, we affirm the judgment of the district court.

BACKGROUND

In September of 1992, Kern began her employment as a secretary for Local 1071. Local 1071 is the Rochester branch of the International Association of Firefighters and is the collective bargaining agent of the firefighters employed by the City. Kern's immediate supervisor was Cavuoto, the president of Local 1071. Cavuoto was a Lieutenant in the RFD, n1 and he also operated a private business known as "Life Safety" with his partner, Lloyd Eldridge. The Life Safety offices were located in the same building as the offices of Local 1071.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Pursuant to a contract between the City and Local 1071, Cavuoto was granted "release time" from his job with the RFD to allow him to perform his duties as president of Local 1071. However, Cavuoto still received full pay and benefits from the City as if he were a full-time employee of the RFD.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*4]

In her complaint, Kern alleged that Cavuoto sexually harassed her on numerous occasions between September and December of 1992. The alleged harassment initially consisted of Cavuoto's attempts to engage Kern in conversations of a sexual nature, but culminated in Cavuoto's physical assault of Kern on December

30, 1992. On that day, according to the complaint, Cavuoto and Eldridge invited Kern to "have a holiday drink" with them in the Life Safety offices. After consuming some wine, Kern claims that she began to feel "drunk and out of control." She excused herself and went to the bathroom located in the Local 1071 offices. Shortly thereafter, Cavuoto entered the bathroom and pushed Kern against the bathroom sink. Kern resisted Cavuoto's advances and then lost consciousness. According to Kern, when she regained consciousness, she was partially disrobed and lying on the office floor with Cavuoto standing above her naked below the waist. Kern immediately dressed and left the office. The next day, Kern reported the incident to the Rochester Rape Crisis Center.

Following the assault, Kern sought the assistance of the Rochester Police Department (the "RPD") and Local 1071. On January 19, [*5] 1992, Kern met with John McMenemy, who was the treasurer of Local 1071 and a lieutenant in the RFD, to discuss the alleged assault. McMenemy prepared a report of Kern's allegations, which was signed by Kern and McMenemy. McMenemy then provided the report to the City's Corporation Counsel, the executive board of Local 1071, and Ippolito, who at that time was the Chief of the RFD.

On February 24, 1993, Kern and her attorney met with representatives of the RPD to file a criminal complaint against Cavuoto. Kern was introduced to Detective D'Ambrosio and Investigator Ruvio, who told Kern that they would investigate her allegations. Although the detectives commenced an investigation, the record does not indicate that Cavuoto was charged with any

crime.

In March of 1993, McMenemy discussed Kern's allegations against Cavuoto with Ippolito. According to Kern, Ippolito told McMenemy that he was "in big trouble" for reporting Kern's allegations to the executive board of Local 1071, and that, not only was his career in the RFD in jeopardy, but also his union position would be lost if "the members [found] out what [he] did." Two days later, McMenemy was denied promotion to Captain in the [*6] RFD.

On June 28, 1993, Kern commenced the action giving rise to this appeal. In her complaint, Kern alleged, inter alia, that the City Defendants were liable under @ 1983 for violating her rights to equal protection, due process, and free speech. According to Kern, Cavuoto was liable under @ 1983 because he sexually harassed and assaulted her during her employment as his secretary, and therefore deprived her of her right to equal protection. Kern further claimed that the City was liable under @ 1983 because it had knowledge of Cavuoto's "womanizing," but failed to take any action to discipline him and therefore deprived Kern of her rights to equal protection and due process. Finally, Kern alleged that the RFD and Ippolito were liable under @ 1983 because they retaliated against her for complaining of Cavuoto's sexual harassment by denying McMenemy a promotion to Captain in the RFD, and thus deprived her of her First Amendment right to free speech.

On August 13, 1993, Kern moved to amend her complaint. In the proposed amended complaint, Kern added a cause of action

under Title VII against the City Defendants and Local 1071. Kern also repleaded her @ 1983 claims against the [*7] City Defendants. Thereafter, the City Defendants and Local 1071 moved, under Fed. R. Civ. P. 12(b)(6), to dismiss the complaint.

By a Decision and Order dated November 23, 1993, the district court granted the motions of the City Defendants and Local 1071 to dismiss Kern's complaint. The district court found that Kern failed to state a claim under @ 1983 against the City or the RFD because she was unable to plead any facts indicating that the deprivation of her civil rights was the result of a policy or custom. The district court also found that Kern failed to state a @ 1983 claim against Cavuoto because she failed to show "that any alleged wrongful actions attributed to Mr. Cavuoto were committed under color of state law." Finally, the district court dismissed Kern's retaliation claims, finding that she did not have standing to assert that McMenemy had been deprived of his civil rights on account of her complaint against Cavuoto.

The district court also denied Kern's motion to amend her complaint. The court found that the amendment would be futile because her Title VII claims would fail, since neither the City nor Local 1071 was an employer for purposes of Title VII. However, the [*8] district court granted Kern leave to move to file an amended complaint setting forth a valid cause of action under Title VII.

On January 19, 1994, Kern again moved to amend her complaint and also moved for reconsideration of the November 23, 1993 order. Her second proposed amended complaint differed

from the original complaint in that she did not allege any violations of @ 1983 and her sole federal cause of action was under Title VII. By a Decision and Order dated December 1, 1994, the district court denied Kern's motion to amend her complaint to add a Title VII cause of action against the City Defendants, but found that a hearing was necessary to determine whether Kern could sustain a Title VII cause of action against Local 1071. The district court also denied Kern's motion for reconsideration of the November 23, 1993 Decision and Order.

On August 14, 1995, an evidentiary hearing was held to determine whether Kern could maintain a Title VII claim against Local 1071. The only issue at the hearing was whether Local 1071 had the requisite number of employees to be considered an employer for purposes of Title VII. By a Decision and Order dated October 5, 1994, the district court found [*9] that Local 1071 did not have the requisite number of employees to be considered an employer for purposes of Title VII, and thus concluded that Kern could not make out a Title VII cause of action against Local 1071. Accordingly, a final judgment was entered dismissing Kern's complaint.

This appeal followed.

DISCUSSION

I. Section 1983 Claims

Kern first argues that the district court erred in dismissing her @ 1983 claim against the City Defendants. We disagree.

A. Claim against Cavuoto

Kern contends that Cavuoto is liable under @ 1983 because he

violated her right to equal protection when he sexually harassed and assaulted her while she was employed as his secretary. In order to state a claim under @ 1983, n2 a plaintiff must allege a violation of rights secured by the Constitution or laws of the United States, and that such violation was committed by a person acting under the color of state law. See Greenwich Citizens Comm., Inc. v. Counties of Warren and Washington Indus. Dev. Agency, 77 F.3d 26, 29-30 (2d Cir. 1996). Because we have held that sex-based discrimination, including sexual harassment, may be actionable under @ 1983 as a violation of [*10] equal protection, see, e.g., Annis v. County of Westchester, 36 F.3d 251, 254 (2d Cir. 1994), Kern adequately pleaded a violation of rights secured by the Constitution. The issue in dispute on this appeal is whether Cavuoto was acting under the color of state law when he allegedly deprived Kern of her right to equal protection.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n2 Section 1983, in part, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The Supreme Court has stated that "the traditional definition of acting under color of state law requires that the defendant in a @ 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer [*11] is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988) (quoting United States v. Classic, 313 U.S. 299, 326, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941)). "It is firmly established that a defendant in a @ 1983 suit acts under color of state law when he abuses the position given to him by the State." Id. at 49-50. Mere employment by a state or municipality does not automatically mean that a defendant's actions are taken under the color of state law. See Polk County v. Dodson, 454 U.S. 312, 319-20, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981).

The district court found that Cavuoto was not acting under the color of state law when he harassed and assaulted Kern. The district court noted that the complaint makes it clear that, although Cavuoto was a lieutenant in the RFD, he was acting solely in his capacity as Local 1071's president during his contacts with Kern. Kern, nevertheless, argues that Cavuoto was acting under the color of state law because the sexual harassment and assault occurred while Cavuoto was receiving full-time pay and benefits from the City. Kern also claims that the fact that the harassment and assault occurred at Local 1071's offices, where Cavuoto regularly conducted business with city employees,

[*12] demonstrates that he was acting under the color of state law.

We think that Kern fails to demonstrate that Cavuoto "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West, 487 U.S. at 49 (quoting Classic, 313 U.S. at 326). First, Cavuoto did not hold his position as president of Local 1071 by virtue of any action by the City. Cavuoto was elected president by union members, irrespective of his position in the RFD. Furthermore, in his capacity as Local 1071's president, Cavuoto performed functions solely for the benefit of the union, not for the benefit of the City. Finally, while Cavuoto may have met with City officials in Local 1071's offices, this does not alter the fact that he did so in his capacity as president of Local 1071 and not as an employee of the RFD. Accordingly, we think that the district court properly dismissed Kern's @ 1983 claims against Cavuoto.

B. Claim against the City

Kern claims that the City is liable under @ 1983 because it knew of Cavuoto's "womanizing" and failed to stop it. Under Kern's theory, the City's duty to prevent Cavuoto's alleged womanizing [*13] arose from its supervisory relationship with Cavuoto. Kern claims that this relationship existed because the City paid Cavuoto a full salary and provided him with benefits while he was president of Local 1071. Even assuming that Cavuoto could be considered to have been under the City's supervision while he was the president of Local 1071, we think that the district court

properly dismissed her @ 1983 claim against the City.

We have held that, "in order to establish the liability of a municipality in an action under @ 1983 for unconstitutional acts by a municipal employee below the policymaking level, a plaintiff must show that the violation of his constitutional rights resulted from a municipal custom or policy." Gottlieb v. County of Orange, 84 F.3d 511, 518 (2d Cir. 1996). Furthermore, "'circumstantial proof, such as evidence that the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction,'" can support a finding that such a policy exists. Id. (quoting Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991)). The policy or custom need not be memorialized in [*14] a specific rule or regulation. Sorlucco v. New York City Police Dep't, 971 F.2d 864, 870 (2d Cir. 1992). However, when discriminatory practices of city officials become "persistent and widespread," they may be considered to constitute a municipal custom or usage. Id. at 870-71.

Kern argues that the fact that the City knew of Cavuoto's harassment yet failed to take any affirmative action to prevent Cavuoto from committing further harassment demonstrates a policy of support for the harassment. We think that Kern fails to demonstrate that Cavuoto's harassment and assault occurred as a result of a municipal custom or policy. There is no indication that either the City or Cavuoto's superiors at the RFD knew of Cavuoto's alleged womanizing. The record does not reveal that, prior to Cavuoto's alleged assault, Kern or anyone else ever

complained about Cavuoto to the City or to Cavuoto's superiors at the RFD. Moreover, while Kern claims that it was well-known around the Firehouse that Cavuoto was a "pig" who had stated that he hires secretaries "with fast hands and slow lips," these assertions are wholly conclusory and are not sufficient to defeat a Fed. R. Civ. P. 12(b)(6) motion [*15] to dismiss. See Butler v. Castro, 896 F.2d 698, 700 (2d Cir. 1990) ("A conclusory allegation . . . without evidentiary support or allegations of particularized incidents, does not state a valid claim."). Accordingly, Kern's @ 1983 claims against the City properly were dismissed.

C. Claim against RFD and Ippolito

Finally, Kern claims that the RFD and Ippolito are liable under @ 1983 for retaliating against McMenemy by denying him a promotion to Captain in the RFD after he reported Cavuoto's harassment and assault to the executive board of Local 1071 and the RFD. We think that the district court properly found that Kern lacks standing to raise a @ 1983 claim on the basis of retaliation against McMenemy.

In Warth v. Seldin, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), the Supreme Court stated that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. at 499. In the present case, Kern does not argue that she personally was retaliated against by the RFD or Ippolito. Instead, she attempts to rest her retaliation claim on an alleged violation of McMenemy's civil rights. Because [*16] this is

precisely what Warth forbids, Kern's retaliation claim properly was dismissed.

II. Title VII claims

Kern argues that the district court erred by failing to allow her to amend her complaint to add Title VII claims against the City and Local 1071. We disagree.

Title VII provides, in relevant part, that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. @ 2000e-2(a). The term "employer" is defined in Title VII as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. @ 2000e(b). "Title VII is an employment law, available only to employees (or prospective employees) seeking redress for the unlawful employment practices of their employers." Tadros v. Coleman, 717 F. Supp. 996, 1002 (S.D.N.Y. 1989), aff'd, 898 F.2d 10 (2d Cir.), cert. denied, 498 U.S. 869, 112 L. Ed. 2d 149, 111 S. Ct. 186 (1990).

A. Claim against [*17] the City

In denying Kern's motion to amend her complaint to add a Title VII cause of action against the City, the district court found that the City was not Kern's employer under Title VII and that "there was no direct co[illegible] between the [City's] actions and the

claimed harm to [Kern]." While Kern concedes that she was not directly employed by the City, she claims that her job would not exist but for the employment of the firefighters for whom she works and the employment contract between the RFD employees and the City. Kern argues that, because of this connection, the City should be considered her employer for purposes of Title VII.

In support of her argument, Kern points to Spirt v. Teachers Insurance & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), vacated on other grounds, 463 U.S. 1223, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983). In Spirt, the plaintiff, a female professor at Long Island University ("LIU"), brought a Title VII action against two annuity fund management companies with which LIU had contracted to manage the retirement program for its employees. The plaintiff claimed that the companies violated Title VII by using sex-based mortality tables to calculate the benefits for plan [*18] participants. In determining that the companies were liable under Title VII, we stated that "the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities." Id. at 1063 (quotation marks omitted). We went on to hold that, although the companies did not directly employ the plaintiff, the companies could be considered her "employer" under Title VII because the companies were "closely intertwined" with LIU in light of the fact that LIU delegated to the companies its responsibility to provide retirement benefits. Id. We also noted

that the finding of an employment relationship between the companies and the plaintiff was supported by the facts that the plaintiff's participation in the retirement program was mandatory and that LIU shared in the administrative responsibilities of the retirement program. Id.

Spirt, however, is distinguishable from the present case. First, Local 1071, unlike LIU in Spirt, has not delegated any of its employment responsibilities to the City. Furthermore, there is no indication that the City shared any of Local 1071's administrative [*19] responsibilities. The City had no authority to hire or fire Kern, to supervise her work or conditions of employment, to determine her rate or method of pay, or to maintain records of her employment. Indeed, Kern fails to allege that her employment at Local 1071 was affected by the City in any way. The only connection that Kern alleges between the City and her employment at Local 1071 is that Local 1071--and therefore her job--would not exist without a city fire department. However, we think that this relationship is too tenuous to bring the City under the Title VII definition of employer. Therefore, the district court properly denied Kern's motions to amend her complaint to add a Title VII action against the City.

B. Claim against Local 1071

In denying Kern's motion to amend her complaint to add a Title VII cause of action against Local 1071, the district court held that, in order for Local 1071 to be deemed an "employer" within the meaning of Title VII and thus be amenable to a Title VII cause of action, it must have at least 15 employees. The district court,

following an evidentiary hearing, determined that "Local 1071 had only five employees during all times relevant to [*20] the complaint." Therefore, the district court determined that it would be futile to allow Kern to amend her complaint to add a Title VII cause of action against Local 1071.

Kern claims that the district court erred in two regards. First, Kern claims that the district court erred in holding that she must prove that Local 1071 employed at least 15 employees during the alleged discrimination in order for her to maintain a Title VII action against Local 1071. According to Kern, because Local 1071 is a labor organization, there is no minimum number of employees requirement to maintain an action under Title VII. In the alternative, Kern claims that the district court erred in determining that Local 1071 employed fewer than 15 employees during the alleged discrimination.

In support of her argument that she need not demonstrate that Local 1071 had 15 employees in order to maintain her Title VII cause of action, Kern points to the EEOC Compliance Manual, Volume II, @ 605, Appendix N. The manual explains that both labor organizations and employment agencies with fewer than 15 employees may be covered by Title VII if they regularly deal with employers covered by Title VII. According to Kern, [*21] because Local 1071 regularly deals with the City, an employer covered by Title VII, she need not demonstrate that Local 1071 has 15 employees.

We know of no federal court that has adopted this interpretation of Title VII. To the contrary, it consistently has

been held that, when a plaintiff brings a Title VII action against a union in its capacity as an employer, the plaintiff must demonstrate that the union meets the Title VII definition of "employer." On the other hand, if a plaintiff brings a Title VII action against a union in its capacity as a labor organization, the plaintiff must demonstrate that the union meets that statutory definition of a "labor organization." n3 See Yerdon v. Henry, 1996 U.S. App. LEXIS 19872, No. 95-7604, 1996 WL 438933, at * 6 (2d Cir. Aug. 6, 1996) (holding "a labor organization with fewer than fifteen employees cannot be sued as an employer for discrimination under Title VII of the 1964 Civil Rights Act"); Chavero v. Local 241, 787 F.2d 1154, 1155 n.1 (7th Cir. 1986) (holding that "under Title VII a union can be both an 'employer' and a 'labor organization,'" and noting that "where . . . a plaintiff attempts to hold the union liable in its employer capacity, [the union] [*22] must fall under that definition, just as any other employer." (citation omitted)); cf. Herman v. United Bhd. of Carpenters & Joiners, 60 F.3d 1375, 1384 (9th Cir. 1995) (holding that, under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. @@ 621 et seq., which contains definitions of "employer" and "labor organization" that are virtually identical to those in Title VII, a plaintiff who sues a union in its capacity as an employer must demonstrate that the union meets the statutory definition of employer); Greenlees v. Eidenmuller Enters., Inc., 32 F.3d 197, 198-99 (5th Cir. 1994) (stating that an employment agency can be classified as either an employer or an employment agency, but, when it is sued in its capacity as an employer,

plaintiff must demonstrate that it meets the Title VII definition of employer). In the present case, because Kern is suing Local 1071 in its capacity as her employer, not in its capacity as a labor organization, the district court properly determined that Kern must demonstrate that Local 1071 meets the Title VII definition of an employer. This definition requires that Local 1071 have at least 15 employees. See 42 U.S.C. @ 2000e(b). [*23] Accordingly, we now turn to the issue of whether the district court erred in determining that Kern failed to demonstrate that Local 1071 had 15 employees.

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n3 42 U.S.C. @ 2000e(d) states, in part:

The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment . . . .

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The district court found that Kern and Local 1071's four officers--the president, the vice president, the secretary, and the treasurer--were the only employees of Local 1071. The district court explicitly rejected Kern's claim that the eight non-officer members of Local 1071's executive board, along with the sergeant-at-arms [*24] and three other persons who provided services to Local 1071, were employees for purposes of Title VII. Because Kern's claim necessarily rests on whether the district court erred in determining that the eight non-officer board members were not employees, we only address this issue.

Title VII defines an employee as "an individual employed by an employer." 42 U.S.C. @ 2000e(f). Courts have held that directors or board members, while traditionally viewed as employers, can be considered employees depending upon their responsibilities within the business. See, e.g., EEOC v. Johnson & Higgins, Inc., 1996 U.S. App. LEXIS 19890, No. 95-6216, 1996 WL 446731, at * 12 (2d Cir. Aug. 8, 1996) (holding that directors of an insurance brokerage firm were employees for purposes of the ADEA because each performed traditional employee duties, worked full-time for the firm, and reported to senior members of the firm). In Chavero, the Seventh Circuit stated that, "although a director may accept duties that make him also an employee, a director is not an employee because he draws a salary. Rather, the primary consideration is whether an employer-employee relationship exists." 787 F.2d at 1157 (citations omitted). In [*25]

EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068 (6th Cir. 1982), cert. denied, 464 U.S. 819, 78 L. Ed. 2d 90, 104 S. Ct. 80 (1983), the Sixth Circuit held that persons who were directors and officers could be considered employees under the ADEA because the individuals "performed traditional employee duties" such as "maintaining records, preparing financial statements, [and] managing the office." Id. at 1070.

In the present case, Kern fails to demonstrate that a traditional employee-employer relationship existed between the eight non-officer board members and Local 1071. The function of the eight non-officer board members was to represent their various constituencies on a board that made and directed the policy of Local 1071 and exercised general oversight over Local 1071's officers. There is no indication that any of the non-officer board members performed any traditional employee duties, such as maintaining records or managing the office. Moreover, there is no indication that the non-officer board members were responsible to anyone but themselves. Thus, the district court properly found that the non-officer members of Local 1071's executive board were not employees for purposes of Title VII. [*26] Without these eight members being considered employees, Kern is unable to demonstrate that Local 1071 had 15 employees. Accordingly, the district court correctly found that it would be futile to allow Kern to amend her complaint to add a Title VII action against Local 1071.

CONCLUSION

We have considered Kern's other contentions, and we find them

all to be without merit. In view of the foregoing, we affirm the judgment of the district court.

wlappa73.wpd

# APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of October one thousand nine hundred and ninety-six.

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Wendy L. Kern,

Appellant,

V

City of Rochester, ET AL.,

Appellee.

UNITED STATES COURT OF APPEALS
Filed
October 15, 1996
George Lange III, Clerk
SECOND CIRCUIT

Dkt No: 95-9107

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Wendy L. Kern.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no

such judge has requested that a vote be taken thereon.

SO ORDERED:
FOR THE COURT,
George Lange III, Clerk
By:
/s/ 10/15/96 /s/Arthur M. Heller
Date Arthur M. Heller
Administrative Attorney

p o ccc
inbancdn__from

# APPENDIX C

## APPENDIX C

**42 U.S.C. §1983 Civil Action for Deprivation of Rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

**42 U.S.C. §1985(3) Conspiracy to interfere with civil rights--Preventing officer from performing duties**

**Depriving persons of rights or privileges**

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such

support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

**42 U.S. C. §1986 Same; action for neglect to prevent**

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under

the provisions of this section shall be sustained which is not commenced within one year after the cause of action has been accrued.

**UNITED STATES CONSTITUTION - FIRST AMENDMENT**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**UNITED STATES CONSTITUTION - FOURTEENTH AMENDMENT**

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**TITLE VII - 42 U.S.C.§2000e(b)**

Definitions

[Employer]

(b) The term "employer" means a person engaged in an industry

affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person...

**Title VII - 42 U.S.C. §2000e-2(a)(1)**

**§703(a)**

[Unlawful Practices of Employers]

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

**Title VII - 42 U.S.C. §2000e-2(c)(1)**

**§703(c)**

[Unlawful Practices of Labor Organizations]

(c) It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin.